Nos. 83-1921 and 83-1957

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE TRANE COMPANY AND MAURICE BOUCHARD, PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

BRIGGS & STRATTON CORPORATION, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether provisions of the Export Administration Act of 1979 and implementing regulations violate the First Amendment by prohibiting petitioners from providing Arab states engaged in a boycott of Israel with certain information about their business activities related to Israel.

2. Whether the regulations' definition of intent to further the boycott is consistent with the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a)[1] is reported at 728 F.2d 915. The opinion of the district court in No. 83-1921 (Pet. App. 6a-27a) is reported at 552 F. Supp. 1378. The opinions of the district court in No. 83-1957 (Pet. App. 28a-52a) are reported at 539 F. Supp. 1307 and 544 F. Supp. 667.

[1] "Pet. App." refers to the appendix to the petition in No. 83-1921 unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984 (Pet. App. 53a-54a). A petition for rehearing was denied on March 26, 1984 (83-1957 Pet. App. A1). The petition for a writ of certiorari in No. 83-1921 was filed on May 24, 1984. The petition for a writ of certiorari in No. 83-1957 was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Export Administration Act of 1979 declares that "[i]t is the policy of the United States * * * to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States" and "to encourage and, in specified cases, require United States persons engaged in the export of goods or technology * * * to refuse to take actions, including furnishing information * * * which have the effect of furthering or supporting the restrictive trade practices or boycotts * * * imposed by any foreign country against a country friendly to the United States." 50 U.S.C. App. (Supp. V) 2402(5)(A) and (B).[2] The Act further provides that, "[f]or the purpose of implementing the[se] policies" (50 U.S.C. App. (Supp. V) 2407(a)(1)):

> The President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by

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[2]The authority granted by the Export Administration Act of 1979 expired on March 30, 1984, but its prohibitions are still in force by virtue of Exec. Order No. 12470, 49 Fed. Reg. 13099 (1984).

a foreign country against a country which is friendly to the United States * * *:

* * * * *

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship * * * with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country.

The implementing regulations provide, in part (15 C.F.R. 369.2(d)):

(1) No United States person may furnish or knowingly agree to furnish information concerning his or any other person's past, present or proposed business relationships:

(i) With or in a boycotted country;

(ii) With any business concern organized under the laws of a boycotted country;

(iii) With any national or resident of a boycotted country; or

(iv) With any other person who is known or believed to be restricted from having any business relationship with or in a boycotting country.

2. The Arab boycott of Israel has been in effect for over 30 years. It has primary, secondary, and tertiary aspects. The primary boycott consists of a refusal by 16 Arab nations to deal with Israel. The secondary boycott is a refusal by 13 Arab states to deal with (and a prohibition against their residents' dealing with) persons or firms that,

although not Israeli, have been blacklisted because of their dealings with Israel. The tertiary boycott involves a refusal to deal with firms that deal with blacklisted firms. Pet. App. 58a-59a; 83-1957 Pet. App. A3-A4.

Petitioners are two United States corporations and one official of each of those corporations. They received questionnaires, from nations participating in the Arab boycott, demanding information concerning their business activities and relationships in Israel. It is undisputed that the Export Administration Act and its implementing regulations prohibit them from answering these questionnaires and that their refusal to answer increases the likelihood that they will be blacklisted by Arab states. Pet. App. 2a.

Petitioners in No. 83-1921 brought suit in the United States District Court for the Western District of Wisconsin; petitioners in No. 83-1957 brought suit in the United States District Court for the Eastern District of Wisconsin. All the petitioners asserted that the prohibition on furnishing information in response to the boycott questionnaires violates the Constitution; petitioners in No. 83-1957 also asserted that the regulations were not authorized by the statute. Both district courts ruled against petitioners (Pet. App. 6a-52a). The court of appeals consolidated the appeals and affirmed (*id.* at 1a-5a).

ARGUMENT

1. Petitioners' principal contention is that the prohibition against answering the questionnaires violates their rights under the First Amendment. In particular, petitioners contend that if they were to answer the questionnaires they would be engaging in speech that is entitled to full protection under the First Amendment, and that the Export Administration Act and its implementing regulations cannot be justified as a restriction on fully protected speech.

In our view, the activity in which petitioners propose to engage — responding to the questionnaries — should not be regarded as speech at all. If it is regarded as speech it plainly should be viewed as commercial speech, and the courts below were correct in concluding that the restrictions challenged by petitioners do not violate the First Amendment.

a. The Arab boycott of Israel is activity by foreign governments that Congress has specifically declared to be contrary to the interests of the United States. As all the courts below found (see Pet. App. 11a, 19a, 20a; compare *id.* at 2a with *id.* at 48a), petitioners would be directly contributing to the success of the boycott if they provided the information sought in the questionnaires. That is because the secondary and tertiary boycotts would be impossible if the participating states could not determine which firms conducted business with Israel or with other blacklisted organizations; therefore, to the extent it is more difficult and costly for the boycotting nations to obtain this information, they will be deterred from conducting the boycott. It is apparent — indeed, petitioners in No. 83-1921 stipulated (*id.* at 63a) — that it will be less costly for the boycotting nations to obtain the information if firms supply it on demand.

Moreover, if petitioners — who expect that the boycotting nations will find their answers to the questionnaires acceptable and will continue to deal with them (see Pet. App. 3a) — are free to respond to the questionnaires, petitioners' competitors will be placed under pressure to conform to the boycotting states' prohibitions against dealing with Israel or with blacklisted firms; otherwise the competitors would not be able to give "acceptable" answers. By contrast, if no American firm is permitted to furnish the information petitioners seek to provide, the boycotting states will find it more difficult to force American firms to

compete in attempting to satisfy the demands of the boycott. As Congress explained in the legislative history of the anti-boycott provisions of the Export Administration Act (S. Rep. 95-104, 95th Cong., 1st Sess. 25 (1977)):

> [T]he prohibition on furnishing information about who does and proposes to do business with a boycotted country or blacklisted person * * * [is] necessary to prevent a boycotting country from using U.S. persons to supply information necessary to boycott enforcement. Such information may very well be available through other sources, * * * [b]ut there is little justification for permitting U.S. persons to supply information when they know it is being sought for boycott enforcement purposes. To do so would be to sanction active complicity in boycott implementation.

There is no First Amendment right to aid or abet an unlawful scheme or a scheme that is contrary to the foreign policy of the United States. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language * * *." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Petitioners would, for example, have no First Amendment right to provide information that facilitated a price-fixing conspiracy. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978); *United States* v. *Container Corp.*, 393 U.S. 333 (1969). Indeed, "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 ([2d Cir.] 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921), and employers'

threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)." *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The supplying of the information petitioners seek to provide has been determined by Congress to further a scheme that is similarly inimical to important national interests. As the district court in No. 83-1957 explained, in an opinion adopted by the court of appeals (Pet. App. 46a; see *id.* at 2a):

> The claim to protected first amendment rights in the free flow of information seems out of place in the context of the instant suit. [Petitioners] do not challenge a statute that prohibits them from presenting the public with price and product information about the [products] that [they] produce[]; the statute is no bar to the free flow of business information to the purchasers of [petitioners'] products. * * * Instead the legislation is designed to interrupt the flow of information to those who conduct an economic boycott against a nation friendly to the United States, a boycott of which Congress does not approve. In this context the admonition to be cautious about a first amendment claim must be heeded.

b. If the answering of the questionnaires is viewed as speech, it must necessarily be regarded as commercial speech. It is undisputed that the information petitioners seek to furnish is information that will make them more attractive, as business partners, to the boycotting states, and that petitioners' sole purpose in furnishing the requested information would be to induce the boycotting states to continue to deal with them. See, *e.g.*, 83-1921 Pet. 10. "By describing * * * [their] qualifications, [petitioners'] sole purpose [would be] to encourage members of the [group

Arab states engaged in the boycott] to engage [them] for * * * profit." *In re R.M.J.*, 455 U.S. 191, 204 n.17 (1982). If petitioners were supplying information about a product for the sole purpose of inducing potential consumers to buy the product, they would undoubtedly be engaging only in commercial speech. See, *e.g., Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 6-8; *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561-563 (1980). The fact that petitioners are seeking to "sell" not a product but their entire firms to the Arab states does not warrant a different result. As the court of appeals explained (Pet. App. 3a-5a):

> [Petitioners] concede that their desire to answer the questionnaires is motivated by economics: through this lawsuit, [petitioners] hope to avoid the disruption of trade relationships that depend on access to the Arab states * * *.
>
> * * * We do not understand [petitioners] to be arguing that they would be interested in answering the questionnaires if truthful answers would result in the imposition of economic sanctions. Rather, their interest is in maintaining their advantageous commercial relationships, and any interest in promoting truth is directly proportional to the economic result it would achieve.
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> * * * [Petitioners] are free to communicate their views about the relative merits of the Arabs' political decisions directly to the Arabs if they choose, so long as in doing so they do not furnish information about business relationships with boycotted countries or blacklisted persons in violation of the Act. However, [petitioners] do not seek to answer the questionnaire in order to influence the Arabs' decision to conduct or

> enforce a trade boycott with Israel. The Arabs' policy in conducting their boycott is irrelevant to [petitioners'] answers. They wish through their answers only to show that the boycott's sanctions should not be applied to them, because they have not violated its terms.
>
> * * * * *
>
> * * * [Petitioners'] proposed answers to boycott questionnaires would serve only to allow [petitioners] to continue to maintain commercial dealings with the Arab world. The government has traditionally regulated the area of international trade. Applying the common-sense distinction articulated in *Ohralik* [v. *Ohio State Bar Association, supra*], we hold that the [petitioners'] proposed communications are commercial speech.

If petitioners' activity is viewed as commercial speech, there is no doubt that the Export Administration Act and its implementing regulations are constitutional. The government "may * * * prohibit commercial speech related to illegal behavior." *Bolger,* slip op. 9, citing *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388 (1973). While the Arab boycott has not been explicitly declared illegal — presumably because it consists entirely of actions by foreign states — Congress has, as we noted, explicitly declared that it is contrary to the policy of the United States.[3]

Moreover, even if commercial speech is related to legal activity, it can be regulated if the regulation serves a substantial government interest and is no more extensive than is necessary to serve that interest. *Bolger,* slip op. 9; *Central Hudson,* 447 U.S. at 564-566. The courts below correctly

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[3]The government has a particularly strong interest in regulating speech that, like petitioners', is directly solely at foreign governments.

ruled that the prohibition at issue here satisfies that test (Pet. App. 48a; see *id.* at 2a). The government plainly has an important interest in ensuring that American firms are not enlisted in aid of a boycott directed at an ally. As we have noted, and as Congress itself found, the prohibition on supplying information directly serves that objective. Petitioners do not suggest any way in which the prohibition might be more narrowly tailored without permitting an exchange of information that will prove helpful to the boycotting states.

2. Petitioners in No. 83-1957 also contend that the definition of intent contained in the regulations is unauthorized by the anti-boycott provisions of the Export Administration Act. The Act prohibits the furnishing of information "with intent to comply with, further, or support [the] boycott" (50 U.S.C. App. (Supp. V) 2407(a)(1)). The regulations provide, in relevant part (15 C.F.R. 369.1(e) (emphasis added)):

> (3) Intent is a necessary element of any violation of this part. It is not sufficient that one take action that is specifically prohibited by this part. It is essential that one take such action with intent to comply with, further, or support an unsanctioned foreign boycott. Accordingly, a person who inadvertently, without boycott intent, takes a prohibited action, does not commit any violation of this part.
>
> (4) Intent in this context means the reason or purpose for one's behavior. It does not mean that one has to agree with the boycott in question or desire that it succeed or that it be furthered or supported. But it does mean that the reason why a particular prohibited action was taken must be established.
>
> (5) Reason or purpose can be proved by circumstantial evidence. *For example, if a person receives a request to supply certain boycott information, the furnishing of which is prohibited by this part, and he*

knowingly supplies that information in response, he clearly intends to comply with that boycott request. It is irrelevant that he may disagree with or object to the boycott itself. Information will be deemed to be furnished with the requisite intent if the person furnishing the information knows that it was sought for boycott purposes. On the other hand, if a person refuses to do business with someone who happens to be blacklisted, but the reason is because that person produces an inferior product, the requisite intent does not exist.

(6) Actions will be deemed to be taken with intent to comply with an unsanctioned foreign boycott if the person taking such action knew that such action was required or requested for boycott reasons. On the other hand, the mere absence of a business relationship with a blacklisted person or with or in a boycotted country does not indicate the existence of the requisite intent.

(7) In seeking to determine whether the requisite intent exists, all available evidence will be examined.

As the courts below noted (Pet. App. 36a-37a; *id.* at 2a), these regulations are fully in accord with Congress's intent. Indeed, the legislative history reveals that Congress specifically considered the problem of boycott questionnaires and resolved it in a fashion that is consistent with the regulations (S. Rep. 95-104 at 39-40):

> The most common example of prohibited information in the present context is a boycott questionnaire designed to elicit information about dealings with the boycotted country or blacklisted persons. The boycott questionnaire typically has no legitimate business purpose. It is intended to establish categories of eligibility for dealings with the boycotting country based on the subject's dealings with third parties. This provision prohibits the supply of that information in such a context.

On the other hand, the same kind of information might be disclosed in an ordinary commercial context. For example, a general contractor or professional engineer or architect might be asked for purposes of obtaining a profile of his experience and qualifications to describe other projects in which he has been engaged. Such information might incidentally disclose whether that person has business relationships with the boycotted country or with blacklisted persons. Similarly, such ordinary commercial documents as a corporation's annual report might disclos[e] the presence or absence of business dealings with a boycotted country or with blacklisted persons. So long as the person supplying the information does not do so with intent to comply with, further, or support a boycott, no violation of the law would occur.

Intent to comply with a boycott could be presumed, subject to rebuttal, where from all the circumstances it is reasonably clear that the information is sought for boycott enforcement purposes. The questionnaire, which on its face, or in the circumstances in which it is supplied, is designed only to elicit information about whether one has dealings with blacklisted persons or boycotted countries presents the clearest case. On the other hand where the information is sought in a context which does not make it reasonably clear that the purpose is boycott related, no illegal intent should be presumed. In a specific case, all the facts and circumstances, including ordinary commercial practice, would govern.

Petitioners suggest (83-1957 Pet. 4) that they cannot have the requisite intent to further the boycott because their answers to the questionnaire will prompt the boycotting nations to continue to do business with them, thus "limit-[ing] the impact of the boycott" (*ibid.*). But it is clear from

the legislative history that Congress did not intend to permit firms to second-guess its judgment that supplying information in response to a boycott questionnaire like those in issue here furthers the boycott. On the other hand, petitioners' assertion that "the regulations presume the requisite statutory intent from the fact of furnishing information" (*id.* at 6) is obviously an incorrect description of what the regulations provide; the regulations specifically state that the nature of the request for information and the context in which the information is sought are relevant to the question of intent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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